No. 11100

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD J. STEEVES, HUGO CALGAN, WILLIAM A. PORTER and SAMUEL S. TAYLOR,
Appellants,

vs.

AMERICAN MAIL LINE LTD., a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEE AMERICAN MAIL LINE LTD.

JOHN AMBLER,
GROSSCUP, AMBLER & STEPHAN,
Proctors for Appellee.
807 Central Building,
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INTRODUCTORY FACTS*

The American Steamship "CAPILLO" was a vessel owned by the United States Maritime Commission. In 1941 she was under bareboat charter to American Mail Line Ltd., and was operated by that company in the trans-Pacific cargo trade between North American Pacific Coast ports and the Philippine Islands via various Oriental ports.

On October 11, 1941, the master of the "CAPILLO" signed Shipping Articles with his crew at Portland,

*All emphasis in quotations, unless otherwise indicated, is supplied. References in (....) are to pages in Apostles on Appeal.

Oregon, for a customary voyage. Just before the vessel sailed from the mouth of the Columbia River on her projected voyage, her routing, due to unsettled conditions in the Pacific, was unexpectedly assumed by the United States Navy. She was ordered to proceed direct to Honolulu, T. H., and from there via a circuitous course direct to Manila, P. I., thus omitting her scheduled calls in China. The vessel in compliance with Navy orders arrived at Manila November 28, 1941. Unable to discharge her cargo, she remained in that port under orders of the United States Government until December 29, 1941, when she was sunk by bombs from Japanese aircraft (35,36, 81). Fortunately her crew suffered no casualty, but soon thereafter they were interned by the Japanese.

The appellants, two oilers, a fireman and a messman, of the crew of the "CAPILLO," after interment near Manila and Shanghai, China, were repatriated to the Port of New York, N.Y., on the second voyage of the International Exchange Motorvessel "GRIPSHOLM," arriving in New York December 2, 1943 (48, 81). The appellants were immediately paid the following:

1. Basic wages and "emergency increase" from October 11, 1941, to December 2, 1943:[1]

Steeves and Calgan, oilers, at $110.00 per mo. each	$2830.67
Porter, fireman, at $100 per mo.	2573.33
Taylor, messman, at $87.50 per mo.	2251.67

[1]These several terms were thus defined by Mr. Williams, a witness for appellee:

"Q The term will later be used 'basic wages.' Will you state what that term means?

2. War bonus November 2, 1941, date vessel crossed 180th Meridian, westbound, to December 29, 1941) at $80 per month, each ..... $ 154.66
3. Port bonus, each 125.00
4. Loss personal effects, each 150.00

with usual appropriate governmental deductions.

Each appellant was likewise paid his own estimate as to overtime wages earned during the voyage, ranging from $68 to $116.45 (135, 136, 269).

RECOVERY SOUGHT BY AMENDED LIBEL

Appellants *each* seek in this action:

(a) War bonus from the date of the destruction of the vessel until his arrival on the Pacific Coast of the United States (December 29, 1941, to December 7, 1943) at $80 per month $1858.67
(b) Transportation from New York to Pacific Coast 125.00

Total $1983.67

(21, 22)

A The basic wages was the wages agreed upon in the original agreement which was negotiated in the fall of 1939.

Q Will you state what is meant by the term 'emergency increase'?

A Emergency increase was an increase to the base wage.

* * * * * * * * *

Q Now, will you state what was meant by the term 'bonus'?

A Bonus was an agreed sum of money to be paid for the additional dangers of going into dangerous waters and war zones." (112, 113, see also 185, 186)

RECOVERY ALLOWED BY TRIAL COURT

Appellants *each* were allowed by the District Court:

(1)	Increased war bonus (December 7, 1941, to December 29, 1941) at the rate of $100 per month under Decision No. 2 of Maritime War Emergency Board, each	$ 14.69
(2)	War bonus during repatriation *voyage* of M/S "GRIPSHOLM" at the rate of $100 per month, under practice established for seamen repatriated on that vessel by Maritime War Emergency Board,[2] each	273.33
	Total	$ 288.02

(48, 49)

THE SHIPPING ARTICLES OF THE "CAPILLO"

The Shipping Articles of the vessel, except for a Rider, are in usual form providing for a voyage from Portland, Oregon, to Shanghai and Hong Kong, China; thence to the Philippine Islands and back to the Pacific Coast of the United States for a term not to exceed six months. The Shipping Articles contain no reference of any kind to war bonus or other war compensation except in a Rider (Original Exhibit A-2).

---

[2]War bonus during repatriation *voyage* was originally declined because *war risk* on the Motorvessel "GRIPSHOLM," operating under International protection, did not appear to be sufficient to warrant payment of war bonus. However, the practice of paying repatriation war bonus to seamen repatriated on the M/V "GRIPSHOLM" was established by the Maritime War Emergency Board (48).

THE RIDER TO THE SHIPPING ARTICLES

The dispute in this case centers upon the interpretation of a Rider to the Shipping Articles of the "CAPILLO," reading as follows:

> "The American Mail Line *agrees* to *pay* an emergency *war bonus* to the crew of the 'S. S. CAPILLO,' Voyage 6, *in accordance* with provi*sions* contained in the *Applicable Supplementary Agreements* in effect between the Pacific American Shipowners' Association and the various marine unions.
>
> "In the event the vessel and/or crew be interned, imprisoned, hospitalized or put ashore due to war causes and for that reason, be unable to continue their voyage, the company agrees to pay wages and *bonus* to the date members of the crew arrive in an United States port, on the Pacific Coast: Furthermore, the Company agrees, in such event, to arrange for repatriation of such men to an United States port, on the Pacific Coast. Also, that the Company be liable for any injuries suffered by any crew member due to war causes.
>
> "The Company agrees to reimburse each man so affected by the amount of $150.00 in the event of loss of personal effects by any member of the crew due to necessity of abandoning the ship resulting from torpedoing, mining, bombings, shelling, scuttling or any other war causes, which results in the ship wreck of the vessel.
>
> "The Company also agrees to carry war risk insurance in the amount of $2,000.00 for each member of the crew, against loss of life as a result of war perils.
>
> "It is further agreed that in the event of any *increase* in pay, overtime or *war bonus*, which

may be granted, as the result of negotiations between the Union and the Pacific American Shipowners' Association, the Company will be *governed* by *the terms and effective date* of any agreement so reached.

/S/ GALE T. BLUNDELL,
Deputy U. S. Shipping Commissioner.

/S/ K. O. DRYER,
Master" (31, 36)

We might observe at this point that *without* such a Rider or other corresponding special agreement the further obligation of the operator to the crew of a vessel, whether for wages, bonus, lost effects or repatriation, is *terminated* by her loss or interment.

"An embargo neither destroys nor suspends the right to wages, if the voyage be afterwards completed, or a new one be substituted for it. But if the embargo is never remitted, that is, *if it be in fact a seizure or arrest, and if the voyage is broken up by it without the fault of the owner or his servants, then it puts a stop to the claim for wages*, like any other extraordinary termination of the voyage. * * *"

Parsons on Shipping and Admiralty, Vol. 2, p. 63.

Saratoga, Fed. Cas. 12,355;

Horluck v. Beal (1916) A.C. 486;

The Edna, 291 Fed. 379;

The Edna, 292 Fed. 640;

Alaska S.S. Co. v. U.S., 290 U.S. 256;

American Mail Line v. U.S., 59 F. Supp. 921;

46 U.S.C. 593.

We give below the salient testimony introduced by

appellee. Appellants introduced no testimony and relied on admissions of appellee.

THE ORIGIN OF THE RIDER

The exact form of Rider used on the "CAPILLO" was prepared by the unions in early August, 1941, and was presented at Portland, Oregon, to American Mail Line Ltd. for use on its vessels (46, 106, 109). It was *first* used on Shipping Articles of a vessel of American Mail Line Ltd., dated August 13, 1941 (107). The Shipping Articles of the "CAPILLO" were the fourth on which the Rider had been used (106).

"AGREEMENTS" AND "SUPLEMENTARY AGREEMENTS" MENTIONED IN THE RIDER

For some years prior to 1941 collective bargaining agreements covering wages, other compensation and working conditions on principal American vessels operating from the ports of the Pacific Coast, including the vessels of American Mail Line Ltd., had been negotiated for the vessel operators by Pacific American Shipowners' Association and for the various departments of the crew by the following six maritime unions (37, 38, 85, 86, 99, 100, 153, 188, 189, 190):

Masters, Mates and Pilots of America, West Coast Local No. 90

Marine Engineers Beneficial Association

American Communications Association (Marine Division)

Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association

Marine Cooks and Stewards Association of the Pacific Coast

Sailors' Union of the Pacific.

Appellants Steeves, Calgan and Porter belonged to the "Marine Firemen." Appellant Taylor belonged to the "Marine Cooks" (Appellant's brief 25, 29).

In 1940 the Association undertook to establish general standards of *war compensation* through general agreements with each union on a *uniform* basis. Prior to that time the subject of war compensation had been a matter of individual negotiations between a shipowner and a particular union or unions (39, 87, 88, 89, 188, 189).

The American Merchant Marine Institute, Inc., on the Atlantic Coast performed a similar function for principal operators of vessels on the Atlantic Coast (41, 42, 86, 161, 162).

BASIC AGREEMENTS

On August 13, 1941, when the Rider was first used, "Agreements" were in effect between the Pacific American Shipowners Association and the six unions covering so-called "basic" wages and general working conditions dated as follows:

Master, Mates and Pilots	December 30, 1939
Marine Engineers	May 1, 1940
American Communications	July 13, 1940
Marine Firemen	October 7, 1939
Marine Cooks	July 5, 1940
Sailors' Union	October 10, 1939

(130)

SUPPLEMENTARY AGREEMENTS

On August 13, 1941, when the Rider was first used on a vessel of American Mail Line Ltd., there had been three so-called Supplementary Agreements adopted between the parties providing for trans-Pacific voyages as follows:

First Supplementary Agreements of 1940

Masters, Mates, May 2, 1940, providing in part:

1. "Emergency Increase" of 10% of "basic" wages.
2. *War bonus* of 25% of "basic" wages from *arrival of vessel at first Japanese port westbound until its departure from last Japanese port eastbound.*

Marine Engineers, May 1, 1940, same provisions.

Marine Cooks, July 5, 1940, providing in part:

1. Emergency increase of 10% of "basic" wages for those earning over $100 a month.
   Flat $10 a month for those earning under $100 a month.
2. War bonus of 25% of "basic" wages from *arrival of vessel at first Japanese port westbound until its departure from last Japanese port eastbound.*

Marine Firemen, April 30, 1940, same provisions.

Sailors' Union, April 30, 1940, same provisions (39, 131).

Second Supplementary Agreements of February 10, 1941

Masters, Mates, February 10, 1941, providing in part:

1. "Emergency increase" increased to 15% of "basic" wages.
2. War bonus of 25% of "basic" wages *and* emergency increase *from the crossing of 160th Meri-*

dian westbound until recrossing 160th Meridian eastbound.

Marine Engineers, February 10, 1941, same provisions.

Marine Cooks, February 10, 1941, providing in part:

1. Emergency increase of 15% of "basic" wages to those earning over $120 per month.
   Flat $17.50 to those earning under $120 per month.
2. War bonus of 25% of "basic" wages and emergency increase to those earning over $120 per month, and
   Flat $30 per month to those earning under $120 per month.
   From crossing of 160th Meridian westbound until recrossing 160th Meridian eastbound.

Marine Firemen, February 10, 1941, same provisions.

Sailors' Union, February 10, 1941, same provisions (39, 132).

Third Supplementary Agreements of May 19, 1941

Marine Engineers, May 19, 1941, providing:

1. War bonus of 50% of "basic" wages *from the crossing of the 160th Meridian westbound to recrossing 160th Meridian eastbound.*
2. War risk insurance $2,000.

American Communications Association, May 19, 1941, same provisions.

Marine Cooks, May 19, 1941, providing:

1. War bonus of 50% of "basic" wages to those earning above $120 per month.
   Flat $60 per month to those earning under $120

per month, *from the crossing of the 160th Meridian westbound to recrossing 160th Meridian eastbound.*

2. War risk insurance $2,000.

Marine Firemen, May 19, 1941, same provisions.

Sailors' Union, May 19, 1941, same provisions (40, 132, 133).

A corresponding Third Supplementary Agreement had *not* been made with the Masters, Mates and Pilots (132).

STATE OF NEGOTIATIONS ON NEW SUPPLEMENTARY AGREEMENTS UNKNOWN TO PARTIES WHEN "CAPILLO" SAILED

On October 11, 1941, when the Shipping Articles of the "CAPILLO" were signed this situation was unchanged in so far as the parties here are concerned. They *knew* of *no* Supplementary Agreement *later* than those of *May 19, 1941* (46, 112, 145, 149). This is the undisputed testimony and is corroborated by the fact that the Rider on the Shipping Articles of the "CAPILLO" was prepared in early August, 1941, and refers to the war risk insurance of *$2,000.00* as provided in the Supplementary Agreements of May 19, 1941 (32, 37).

It will be *particularly* observed that there were *no* supplementary agreements known to the parties in early August, 1941, *or* on October 11, 1941, covering the following:

1. Compensation to be paid members of the crew after a vessel was lost or interned and so unable to continue her voyage due to war causes.

2. Repatriation of the crew in such event.
3. Loss of personal effects in such event (146, 147, 148, 149).

As indicated, without *specific* agreement, seamen would have no rights on these subjects. The emphasis had been on *amount* of bonus. Loss or interment of a vessel seemed remote.

However, in that period, between August and October, 1941, much had occurred in negotiations between the representatives of the operators and the unions in regard to such war compensation. The first and last paragraph of the Rider made such later developments in negotiation a part of the Shipping Articles (98, 154).

DEVELOPMENTS IN COLLECTIVE BARGAINING ON WAR COMPENSATION FOLLOWING EXECUTION OF SUPPLEMENTARY AGREEMENTS OF MAY 19, 1941

Subsequent to the execution of the Supplementary Agreements of May 19, 1941, covering war compensation, unrest and dissatisfaction continued in the matter of *war compensation*, not only between operators and the unions, but particularly between unions, each attempting to work out a more advantageous arrangement for its own membership. Particularly keen rivalry arose between Pacific Coast and Atlantic Coast unions on this subject (40, 189). Many and serious work stoppages resulted. To remedy this condition the United States Maritime Commission and the Department of Labor called conferences of Atlantic Coast and Pacific Coast operators and unions in July and

August, 1941 (40, 89, 165, 190). The following call for this conference was issued, signed by the Chairman of the United States Maritime Commission:

"July 22, 1941

"Mr. Frank J. Taylor, President
American Merchant Marine Institute, Inc.
11 Broadway
New York, New York

"Dear Mr. Taylor:

"A series of conferences are being called on August 12, August 15, and August 19, 1941, between representatives of sea-going organized labor and offshore steamship operators for the purpose of affording these representatives an opportunity of reaching a *decision* covering the payment of *war bonuses* on a *national uniform basis.*

"These conferences will be held under the auspices of the Department of Labor and the Maritime Commission, and will take place in Room 7856 of the Department of Commerce Building, at 10:00 A.M., on the dates mentioned above. The first conference, on August 12, will be devoted to the question of war bonuses as they affect licensed and registered officers; on August 15, as they affect radio operators; and on August 19, as they affect unlicensed personnel.

"This letter constitutes a formal invitation for your association to be represented and participate in these deliberations.

"As the executive officer of your association, the designation of your representatives will be left to your discretion, but it is hoped that in such designation you will have in mind the benefits to be derived from a small but adequate representation.

"Will you advise me of your acceptance of this invitation, as well as of the names of those who, with you, will represent your organization.

"A communication identical to this is being sent to Mr. A. O. Woll, Secretary of the Pacific American Tank Ship Association, and to Mr. J. B. Bryan, *President* of the *Pacific American Shipowners Association.* If you think it is desirable that invitations be sent to others than those mentioned herein, will you kindly advise me to that effect. Sincerely yours,

(Signed) E. S. LAND
E. S. Land, Chairman"
(40-41, 219-220)

Similar letters were sent to all interested parties.

The conferences opened in Washington, D. C., on August 12, 1941, with the following introductory remarks by Commissioner Macauley of the United States Maritime Commission:

"As you know from the letters inviting you to be present, this conference between representatives of the licensed officers' organizations and representatives of the off-shore steamship operators is being held under the auspices of the Department of Labor and the U. S. Maritime Commission, in order to permit these representatives an opportunity to present to the Department of Labor and the Maritime Commission their views as to the determination of a proper *national uniform basis* for payment of *war* bonuses to the licensed officers of American Merchant ships.

"It is desired that this conference be *confined strictly* to the purpose for which it has been called, i.e., to achieve a *nationwide agreement on war risk compensation.* It is considered that *other subjects,* such as wages, hours and working condi-

tions, are extraneous and *not pertinent* to the discussion.

"It is also desired that any agreement reached should be final and binding on all parties and independent of any existing or future agreements as to basic wage scales and working conditions.

"It is not contemplated that a single rate for all of the various services, regardless of the destination of the vessels, should be put into effect, but rather that *in each danger area* the rates should be uniform regardless of the port of original departure.

"The agreement arrived at should *remain* in force *except* in one of the following events:

(a) *Declaration of war* by or against the United States.

(b) Change of danger or combat zones proclaimed by the President of the United States.

(c) Abolition of all *danger zones* as may be anticipated on the cessation of hostilities between the warring countries.

"In either of the first two contingencies, *similar conferences* shall be called by the Maritime Commission and the Department of Labor, to *re-examine* the question of war bonuses.

"If a basic formula for future action is worked out, provision should be made to take care of the compensation to be paid in a new area on the same relative basis as is prescribed for existing areas under the general formula.

"The Commission does not desire to prescribe the agreement to be arrived at, but does insist that the scope of the discussion be confined to the subject of war bonuses. The Commission urges that this matter be settled as speedily as possible,

in a spirit of fairness and cooperation, so that the result may not only be a mutually satisfactory and agreeable working arrangement, but an urgent and important contribution to the National Defense." (42, 221-223)

THE AUGUST CONFERENCE AND NEGOTIATIONS

A contract between *operators* on both Coasts and *licensed* personnel in the Deck and Engine Departments covering war compensation was first considered at the Conference (43, 166, 190). Joint demands had been presented by the licensed officers, i.e., Masters, Mates and Pilots and the Marine Engineers. As applicable to this case, these demands were (166, 167):

1. War bonus of 100% of wages for the "entire voyage" on vessels going to the "Far East." Other rates were suggested for other "voyages," and a bonus rate for certain ports.
2. Loss of personal effects, $500.
3. Repatriation to port of "*signing on.*"
4. If the vessel be lost or interned, wages, emergency wages *and* war bonus to be paid licensed officers "*until and including the date of their arrival in a port of the United States.*"
5. War risk insurance, $10,000 (209-212).

On August 12, 1941, American Merchant Marine Institute, Inc., and Pacific American Shipowners Association made a *counter-proposal* suggesting six so-called "Danger Zones," with accompanying bonus "payable for voyages to *above defined zones*" including:

> "ZONE IV Transpacific *voyages* to Japan, Philippine Islands, China, Indo-China, East Indies and Malayan Peninsula."

The Associations likewise counter-proposed the following:

1. In Zone IV 50% of basic wages and emergency increase "from crossing of the 160th Meridian of East Longitude westbound, until crossing the same Meridian eastbound."
2. Loss of personal effects, $300.
3. Repatriation to a "*Continental* United States Port."
4. If the vessel be lost or interned, *wages* and *emergency increase* to the date licensed officers *arrive in a continental United States port*, and war bonus "*while the men are in the Danger Zones described above.*"
5. War risk insurance, $5,000 (192, 242-244).

After further negotiations a joint contract between the two Associations and the two unions representing licensed deck and engine room personnel was effected dated August 16, 1941 (43, 167, 190, 191, 213-223).

THE CONTRACT OF AUGUST 16, 1941

This contract is a major factor in this discussion and the date is important. It will be noted that it is dated three days after the Rider was first *used* and even longer after it was first *presented* by the unions.

This contract covered for the first time in a general agreement the *same subject* matter as paragraphs second, third and fourth of the Rider with some wide variation.

This contract of August 16, 1941, *incorporated* by specific reference the Invitation Letter of Admiral Land and the opening remarks of Commissioner Macauley, quoted above, by *attaching copies thereof* to

the *contract* itself. This is an unusual illustration of the importance of the two documents which will be later further emphasized (167, 168, 213, 219, 221).

This contract of August 16, 1941, adopted six "War risk areas" in substantially the form proposed by the operators. It provides in part:

1. AREA IV (Trans-Pacific voyages) War bonus of "60% of basic wages from the crossing of the 180th Meridian westbound, until recrossing the same Meridian eastbound."
2. Lost effects, $500.
3. Repatriation to a *continental* United States port.
4. If the vessel be lost or interned, *wages* and *emergency* increase to the date licensed officers arrive in a "*Continental* United States Port." *No war bonus* was *payable* in such event (224).
5. War risk insurance, $5,000 (213-223).

Subsequent negotiations between the two Associations and other unions failed to result in an agreement covering any staff officers or unlicensed personnel on either Coast (43, 89, 169, 192). Frequent work stoppages continued to occur on vessels on both Atlantic and Pacific Coasts (43, 194).

On September 15, 1941, "Marine Firemen" made the following demands upon Pacific American Shipowners Association:

1. In "Transpacific" trade *war bonus* of 75% of "basic" wages to all employees receiving basic wages in excess of $120 per month; flat $90 per month to all employees entitled to receive $120 or less as basic wages per month. Bonus to be payable from "crossing of the 160th West Meridian westbound, until recrossing same Meri-

dian eastbound." Double bonus for vessels carrying dangerous cargo.

2. Lost effects, $160.
3. Repatriation to *continental* United States ports.
4. In event vessel be lost or interned, wages *and* bonus to continue "*to the date members arrive in a Continenetal United States port.*"
5. War risk insurance, $5,000 (193, 244-249).

On September 16, 1941, "Sailors' Union" likewise made written demands upon Pacific American Shipowners Association calling for . . .

1. "War Bonus" of $3 per day to each unlicensed member of the deck department in "transpacific" trade from the "day vessel crosses the 160th West Meridian, westbound, until the crossing of the same Meridian eastbound."
2. Loss of personal effects, $250.
3. Repatriation to a *Pacific* Coast port.
4. If the vessel be lost or interned, wages *and* bonus for each member of the deck department "*until arrival at home port.*"
5. War risk insurance, $10,000 (193, 250-255).

Other miscellaneous demands were likewise included by both unions. Other unions awaited developments and did not present demands at this time (193).

The situation became so acute due to frequent work stoppages on vessels on both Coasts, that on September 22, 1941, Admiral Land, Chairman of the United States Maritime Commission, telegraphed the two Associations of operators and the unions as follows:

"Maritime Commission views with concern

and anxiety the danger to shipping so vitally needed for national defense and all out aid to the democracies unless some method and procedure are immediately found and resorted to which will remove future sources of contention between all elements of the industry and which will stabilize and to a greater extent than now prevails *standardize* bonuses on our various trade routes. Believing that the solution of these problems rests primarily in the hands of representatives of operators and representatives of personnel and that these objectives can be secured through a joint meeting, the Maritime Commission will if requested by these representatives call such a meeting. We therefore offer the facilities of the Maritime Commission for purposes of holding conferences between the Seafarers' International Union, National Maritime Union, Sailors' Union of Pacific, Marine Cooks & Stewards of Pacific and Marine Firemen, Oilers, Water Tenders and Wipers Association of Pacific representing unlicensed personnel of vessels operated by companies who have collective bargaining agreements with those unions and the American Merchant Marine Institute, also the Pacific American Shipowners Association representing the owners, also other owners not members of those associations so that agreement can be reached between the owners and the unlicensed personnel with respect to *war bonuses* and *war risk areas.* Will be glad to make our facilities available for meeting in Washington Thursday this week. The Maritime Commission urges immediate return to work and sailing of vessels. Will appreciate your telegraphic reply. E. S. Land, U. S. Maritime Commission." (43, 44, 170, 171)

The "joint meeting" suggested by this wire, was not held, but the subject of war compensation of unlicensed personnel finally came before the National Defense Mediation Board in Case No. 80, on September 29, and October 1, 2, 3 and 4, 1941, in a proceeding in which American Merchant Marine Institute, Inc., and Pacific American Shipowners Association and the Sailors' Union of the Pacific were parties (45, 171, 172, 194). On October 6, 1941, the Board rendered its recommendations in which it created five "war risk areas" substantially similar to those of the agreement of August 16, 1941, between the Associations and the unions representing licensed personnel (171, 172, 195, 226). The recommendations of the Board provided, in part, the following:

1. War risk bonus of $80 per month for "Transpacific *voyages*" after "*crossing the 180th Meridian westbound until recrossing the same Meridian eastbound.*"
2. $100 per day, plus $5 per day for each day beyond five days that the vessel is in a port subject to regular bombing (226-231).

These recommendations as to "voyages" followed closely the contract of August 16, 1941.

No special provision was made for loss of *personal effects, repatriation, compensation* during *internment*, or war risk *life insurance.* Provision, however, was made for modification in case of spread of hostilities. These recommendations were eventually incorporated by the parties in their contracts (120, 173).

FURTHER DEVELOPMENTS IN LABOR NEGOTIATIONS ON WAR COMPENSATION ON PACIFIC COAST UNTIL "PEARL HARBOR"

Shortly following the publication of the Decision of the National Defense Mediation Board, in Case No. 80, and its acceptance, Fourth Supplementary Agreements covering the subject of war compensation were effected by Pacific American Shipowners Association with the six maritime unions on a substantially *uniform* basis. These six Supplementary Agreements were dated as follows (45, 46, 133, 195):

Masters, Mates	October 10, 1941 (259-265)
Marine Engineers	October 15, 1941 (265)
American Communications	October 16, 1941 (266)
Marine Firemen	October 9, 1941 (114-117)
Marine Cooks	October 10, 1941 (119-126)
Sailors' Union of the Pacific	October 9, 1941 (266-268)

These *October Supplementary Agreements* provided as follows:

1. "Five war zones," including "Transpacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula (after crossing the 180th Meridian westbound until re-crossing the same Meridian eastbound)."
2. War Bonus of a *flat $80* a month to unlicensed personnel earning less than $120 a month. (War bonus of 66 2/3% of basic wages was granted to unlicensed personnel receiving over $120 a month *and* licensed officers by the October Supplementary Agreements. This increase over the rate in the contract of August 16, 1941, with licensed officers was necessary on both Coasts to equalize the licensed officers with the October

increase given the unlicensed personnel (177, 196).

3. Lost effects, licensed officers and radio operators, $500; unlicensed personnel, $150.
4. Repatriation to "Continental United States port."
5. If vessel be lost or interned *basic wages* and *emergency wages* until arrival at "Continental United States ports," and war *bonuses* at the rates specified * * * shall be paid while "*employees are in the war zone areas described herein.*"
6. War risk insurance, all crew members, $5,000 (114-117, 119-126).

The provisions of the October Supplementary Agreements with unlicensed personnel *including the four appellants all* contain the following two clauses:

"4. War Risk Insurance in the sum of $5,000 shall be furnished to members of the crews of vessel on voyages provided for in this agreement.

"In the event a vessel is *interned, destroyed* or abandoned as a result of war operations and is unable to continue her voyage, the *basic wages* and *emergency wages* specified in the collective bargaining agreement between the parties shall be *paid to the date the* members of the *crew arrive in a Continental United States port* and the employees shall be repatriated to a Continental United States port. War *bonuses* at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid *while employees are in the war zones defined herein.*

"In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, min-

ing or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of $150.00." (123-124)

6. "The *provisions* of this agreement shall be *effective* on *all voyages* shipping articles for which were entered on or *after August 16*, 1941, *or* upon *any* voyage to which the *provisions* herein are made *applicable* by *special* agreement or *rider attached* to *shipping* articles." (124)

The October Supplementary Agreements covering licensed personnel and radio operators likewise contained language of similar character (259, 265, 266). The close relationship of the October Supplementary Agreements with the August Conferences and the objectives there sought of *uniformity* will be noted. The October Supplementary Agreements *all* became effective as of August 16, 1941, and in the case of the three unions representing *unlicensed* personnel each *likewise* refer specifically to the Decision of the National Defense Mediation Board in Case No. 80 (115, 120, 267). It is undisputed that the subject matter of the October Supplementary Agreements was unknown to the operator or crew of the "CAPILLO" when the Master signed on his crew October 11, 1941, and even when the vessel sailed (46, 112, 145, 149). On November 5, 1941, the operator purchased increased War Risk Insurance on all members of his crew from the $2,000 of the May Supplementary Agreements and the Rider to the $5,000 of the October Supplementary Agreements (157).

New agreements providing an *increase* in basic wages were finally negotiated and signed between

Pacific American Shipowners Association and the six unions as of the following dates:

Masters, Mates and Pilots,	December 12, 1941
Marine Engineers,	November 28, 1941-January 15, 1943
American Communications,	November 18, 1941
Marine Cooks,	October 31, 1941
Marine Firemen,	October 10, 1941
Sailors' Union	November 4, 1941

(134)

By these agreements the basic wages of each of the appellants was increased $10.00 a month. Considering the provisions of these agreements providing for increase in wages to have been incorporated by the Rider, appellants were each paid in New York at a wage rate of $10.00 a month in excess of that shown on the Shipping Articles (135, 269).

FURTHER DEVELOPMENTS IN LABOR NEGOTIATIONS ON WAR COMPENSATION ON ATLANTIC COAST UNTIL "PEARL HARBOR"

Following the decision of the National Defense Mediation Board in Case No. 80 negotiations continued between the American Merchant Marine Institute, Inc., and the National Maritime Union of America, looking to an agreement covering war compensation for *unlicensed* personnel on the East Coast similar to the agreement reached on August 16, 1941, with licensed personnel (174, 175). As of November 6, 1941, such an agreement was made providing eight types of "*voyages.*" As to the voyage here involved it provided:

1. "On the trans-Pacific, Far East and Australian

runs, $80 per month from the 180th Meridian, westbound, until return to the 180th Meridian, eastbound."

2. Lost effects, $150.
3. Repatriation to a "*Continental* United States port."
4. If the vessel be lost or interned, *basic wages* and *emergency wages* until arrived at a "Continental United States port." As in the case of licensed officers *no war bonus* was payable in such event (183, 186, 224).
5. War risk insurance, $5,000 (231-236).

As of December 2, 1941, a similar contract was made between the parties covering certain *voyages* to Russia and the United Kingdom (176, 236-240). This contract likewise allowed basic wages and emergency increase after *loss* or internment of the vessel but *no bonus* was payable in such event. Also the agreement of August 16, 1941, between operators and unions on the Atlantic Coast was amended to raise bonus from 60% to 66 2/3% of basic wages to equalize the increased bonus to unlicensed personnel (177, 178). Thus on December 7, 1941, the *uniformity* so strongly urged by Admiral Land and Commissioner Macauley in the meetings held in August, 1941, was substantially attained on both Coasts by signed collective bargaining agreements.

FURTHER NATIONAL DEVELOPMENTS ON WAR COMPENSATION FOLLOWING "PEARL HARBOR"

In accordance with the promise made by Commissioner Macauley in his remarks on August 12, 1941, heretofore quoted (222), a meeting of all operators and unions on both Coasts was called in Washington, D. C., by the United States Maritime Commission and the United States Department of Labor on December 17-19, 1941, within ten days of the attack on Pearl Harbor (47, 92, 199). At this meeting a "Statement of Principles" was adopted and signed on behalf of the operators, including American Line Ltd. and the unions, including all here involved (47, 92, 199-205). The opening paragraph is as follows:

> "I. In so far as areas, war bonuses and insurance are concerned, it is regarded as desirable and necessary that a *uniform basis* for each item covering the entire Nation and the entire Industry be reached."

By a *joint voluntary action* of the parties the "Maritime War Emergency Board" was created to settle "questions relating to *war risk compensation* and insurance," it being impossible for the parties to negotiate intelligently on the subject because of war secrecy as to comparative risk in war zones. A three-man board was proposed whose decision on any "*question* relating to *war risk compensation* or war risk insurance" was "*final* and *binding* upon *all parties*" (203).

On December 19, 1941, the President of the United States, upon the joint request of the parties, appointed a board of three to carry out the purposes of

the "Statement of Principles" (205-6). The Board has "exclusively handled" all *bonus* questions since its appointment (92, 93). At this time the "CAPILLO" was still on her "voyage" awaiting orders of the Government authorities in Manila (36, 81).

DECISIONS OF THE MARITIME WAR EMERGENCY BOARD

The Board on December 22, 1941, by Decision No. 1, made *retroactive* to December 7, 1941, promptly established war risk insurance of $5,000. Other Decisions quickly followed. See 1942 A.M.C. 308.

By Decision No. 2, dated January 10, 1942, likewise made *retroactive* to December 7, 1941, the Board divided "voyages" into six classifications in the same manner as had the Supplementary Agreements which it superseded (272-274). In fact the Decision said:

> "In making this Decision the Board has given due consideration to the existing conditions at sea and in port, based upon the latest and best information available, *and to existing collective bargaining agreements.*" (270)

Decision No. 2 of the Board increased war bonus in Classification No. I(b) "Trans-Pacific voyages" to 100% of wages and emergency increase with a floor of not less than $100.00 per month in any case (47, 48, 272, 274). It provided a *port bonus* of $125.00 for calls in the Philippine Islands (275).

Decision No. 5 of the Board was first made January 23, 1942. It covered for the first time "payments to seamen * * * while interned as a result of enemy action and until repatriation to Continental United

States." It was made retroactive "to and including December 7, 1941." It only provided for payment of "basic wages and emergency wages" after loss or destruction of the vessel. It had no provision for continuation of bonus after loss or internment of the vessel. This decision said:

> "In making this Decision the Board has given careful consideration * * * to existing collective bargaining agreements." (288)

A Supplement to Decision No. 5, dated February 6, 1942, is of no importance here (293). A third amendment to Decision No. 5, dated February 17, 1942, for the first time specifically covered the subject of continuation of bonus following the loss or interment of the vessel. It said:

> "2. The Board has given consideration to the continuance of bonus in the case of the destruction of the vessel, which subject was not covered by Decision No. 5, and, as a result, Decision No. 5 has been amended by inserting a new Article at the end thereof, designated Article 6 and reading as follows" (295):

By Article 6 the rule is stated that when a United States vessel is lost or interned war bonus continues "until the seaman arrives at a port where he is no longer exposed to marine perils * * *" (295-296). If he is repatriated by sea then he shall receive *during the repatriation voyage war bonus at* the same rate that he would have received if his own vessel were making the same *voyage* as the vessel on which he is being repatriated. In other words war bonus was not ended at once upon loss or interment of vessel, but continued to be payable when a seaman is exposed to a marine *and* war risk (See definition of bonus, 113).

The three amendments were combined without further change in Decision No. 5, Revised, issued February 21, 1942 (280-287). Decision No. 5, Revised, with the last amendment referred to above, provides:

> "The Board has given *additional* consideration to the current war conditions at sea and to *existing collective bargaining agreements* prior to writing these revisions." (280-281)

Decision 5 Revised provides:

> "This Decision is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the making of payments provided for herein contained in ships Articles entered into on or before * * * February 21, 1942, with respect to payments provided for in Article 6 hereof or collective bargaining agreements in effect at the time when ship's articles were entered into as aforesaid, *or where the making of such payments were expressly left open subject to later agreement either in the ship's articles or such collective bargaining agreements.*" (281-282)

The rule of the Maritime War Emergency Board that no bonus is payable during *interment ashore* has been the uninterrupted rule of the Board since its first pronouncement on the subject.[3] Its last pronounce-

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[3]Maritime War Emergency Board Weekly Bulletin No. 12. March 6, 1943. Ruling No. 8.

Weekly Bulletin No. 17, April 10, 1943. Ruling No. 4.

See also Original Respondent's Exhibit A-13, Article January, 1944, Monthly Labor Review, U. S. Dept. of Labor, *not admitted* by trial court. Note, however, a correction of this article in one respect (182, 183).

ment on the subject was in Decision 2-D, dated August 31, 1945:

"Article IV, A(1)

"1. Bonus shall *not* be payable while a crew member is *on land* after separation from his vessel.

"2. Bonus shall *not be payable during* the period that a crew member is *detained* either by capture by the enemy of an United States or *by internment.*"

1945 A.M.C. 1176, 1182.

The trial court adopted the view that Decision 2 and Decision 5 Revised of the Maritime War Emergency Board were incorporated by the first and last paragraphs of the Rider and so became controlling, and gave judgment accordingly (47-49).

ARGUMENT

Admissibility of surrounding circumstances in construction of ambiguous contract.

It is well settled that the situation of the parties and the surrounding circumstances may be taken into consideration in construing an ambiguous contract. This would seem especially true where, as here, the contract itself incorporates by reference the terms of outside agreements then under negotiation.

In *New York Alaska Company v. Walbridge* (C.C. A. 9) 76 F.(2d) 655, the court said:

"It is also well settled that when the meaning of a contract is not clear, the situation of the parties and the surrounding circumstances at the time of the making of the contract are to be taken into consideration."

Franklin Fire Co. v. Hanney (C.C.A. 9) 149 F.(2d) 150;

Mobile & Montgomery Co. v. Jurey, 111 U.S. 584, at 592.

This is also the law of Oregon and Washington.

Teiser v. Swirsky, 137 Ore. 595, 2 P.(2d) 920.

In *Vance v. Ingram*, 16 Wn.(2d) 399, 133 P.(2d) 938, the court said:

"One further rule of construction should be mentioned. The court may always consider the surrounding circumstances leading up to the execution of an agreement, not to evidence an intent contrary to that expressed in the agreement, but to place the court in the same position as the parties. * * *"

12 Am. Jur. 784;

Restatement of Law of Contracts, §230, §235(d), §242.

Which supplementary agreements are incorporated by the rider?

For ready reference we quote again the first and last paragraphs of the Rider at this point:

"The American Mail Line agrees to pay an emergency war bonus to the crew of the S. S. CAPILLO, voyage 6, in accordance with *provisions* contained in the *applicable* supplementary agreements in effect between the Pacific American Shipowners' Association and the various marine unions.

* * * * * * * * *

"It is further agreed that in the event of any *increase* in pay, overtime or war bonus, which

may be granted, as the result of negotiations between the Union and the Pacific American Shipowners' Association, the company will be governed by the *terms* and *effective* date of any agreement so reached." (31, 32, 36, 37)

This language is susceptible of three possible interpretations:

Are supplementary agreements of May 19, 1941, incorporated?

It could possibly be argued that the "applicable" Supplementary Agreements made effective by the first paragraph of the Rider are the agreements of May 19, 1941. In support of this theory the following might be urged:

1. It was clearly the one actually in the mind of the parties when the Rider was *first* used. No other existed on August 13, 1941. That this was likewise so even on October 11, 1941, is indicated by the reference in the Rider to the war risk insurance of $2,000.00 created by the Agreements of May 19, 1941, and the ignorance of the parties of the *terms* of any other supplementary agreements (46, 112, 145, 149).

2. It explains the inclusion of the second and third paragraphs of the Rider having to do with compensation after loss or internment of the vessel and for lost effects. These were inserted because no provision was made for such matters in the agreements of May 19, 1941, and no agreement on same had been reached on August 13, 1941, when the Rider was *first* used. As heretofore indicated, *without such provisions*, upon loss or internment of the vessel further obligation to the crew *terminated*. Its use was continued because

no agreement was known to exist on such matters on October 11, 1941, when it was placed on the Shipping Articles of the "CAPILLO" (46, 98, 112, 145, 149, 154).

Such an interpretation, however, *completely ignores*:

(a) The obvious attempt of the *first* paragraph of the Rider to incorporate the "provisions" of Supplementary Agreements as they became "applicable," thus keeping the Rider at all times *current* with the rapidly changing conditions.

(b) The *last* paragraph of the Rider which incorporates the "*terms* and effective date" of any later agreements which increased "pay, overtime or war bonus."

It might be emphasized here that there were several increases in "pay, overtime or war bonus" in the October Supplementary Agreements over the Supplementary Agreements of May 19, 1941, thus likewise bringing into play the last paragraph of the Rider.

1. The rate of bonus was increased from $60.00 a month to $80.00 a month, for unlicensed personnel, such as appellants, earning under $120.00 a month (133, 116).

2. For licensed officers and unlicensed personnel earning over $120.00 a month bonus was raised from 50% of basic wages to 66 2/3% of basic wages (132, 116, 261, 265).

3. The area in which bonus was payable in all cases was increased *from* the crossing of the 160th Meridian westbound to recrossing the same Meridian eastbound

to the period from crossing the 180th Meridian westbound to recrossing the 180th Meridian eastbound (132, 116, 261).

4. Port bonus was provided in the case of unlicensed personnel for ports subject to regular bombing (114, 117, 266).

5. Payment for lost effects of unlicensed personnel was provided at $150.00 and for licensed personnel at $500.00 for the first time in the October Supplementary Agreements (114, 117, 259, 265, 266).

6. War risk insurance increased for all persons from $2,000.00 to $5,000.00 (114, 117, 259, 265, 266).

It will be also recalled that basic wages for the appellants had been raised $10.00 a month by contracts negotiated in the late fall of 1941, and appellants were paid off at these new basic rates rather than those shown in the Articles (135, 269).

(c) The following language of the October Supplementary Agreements covering the four appellants:

> "6. The *provisions* of this agreement *shall* be effective on *all voyages* shipping articles for which were entered on or *after August 16, 1941*, or upon *any* voyage to which the provisions herein are made applicable by special agreement or rider attached to shipping articles." (124)

By this clause of the October Supplementary Agreements it is mandatory that their "provisions" are effective "on all voyages" shipping articles for which were entered into on and after "August 16, 1941," which, of course, includes the voyage here in question which commenced some two months after August 16, 1941.

It is an interesting sidelight on the use of the Rider that when it was first used on August 13, 1941, the alternate paragraph of the quotation above would have been applicable and it would be incumbent upon the court to decide whether or not the October Supplementary Agreements had been incorporated by "special agreement or rider attached to shipping articles." On the subsequent three occasions when the Rider was used, however, no such determination would have been necessary as it was *mandatory* that the provisions of the October Supplementary Agreements be applied.

So again, this is likewise the uncontradicted testimony of the witnesses in the case.

> MR. LINTNER: "My understanding was at the time that a rider was just a temporary understanding which was to be interpreted and determined by the results of negotiations which were under way at the time. It was not unusual for us to put on riders on articles to cover situations that were under discussion, and in every case it was the practical application that the results and the agreements reached in connection with those riders were what the rider meant." (98, 99)
>
> MR. WILLIAMS: "Well, it is my opinion that, in the first place, the rider to the articles was introduced by the Union officials, and not necessarily by the men themselves, so the men recognized that the Unions were acting on behalf of them when the rider was first presented. So, with the reading of the first paragraph and the last paragraph, in which *they agree to be bound by any supplemental agreements negotiated between the Ship Owners and the Unions*, that that in itself proved that the men were giving the Union authority to act on their behalf." (154)

It is therefore clear that (aside from the question of the applicability of the Decisions of the Maritime War Emergency Board) the "provisions" of the October Supplementary Agreements were incorporated in the contract of employment of appellants and supplanted the rider provisions to the contrary. This was accomplished: (a) by the first and last paragraphs of the Rider; (b) by the language of the October Supplementary Agreements themselves, and (c) by the uncontradicted testimony of the witnesses.

The amended libel, the opening statement of appellants at the trial and the appellants' brief specifically rely upon the October Supplementary Agreements (17, 81; Appellants' Brief, pp. 29, 37, 59).

Are supplementary agreements of October, 1941, incorporated by the rider?

Disregarding for the moment the decisions of the Maritime War Emergency Board, it thus appears that all parties are in agreement that the October Supplementary Agreements apply. The particular applicable "provisions" and "terms" of the October Supplementary Agreement between the Marine Cooks and Pacific American Shipowners Association dated August 9, 1941, reads as follows:

> "In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the *basic* wages and *emergency* wages specified in the collective bargaining agreement between the parties shall be paid to the *date* the members of the crew arrive in a *Continental* United States port and the employees shall be repatriated to a Continental United States port. War *bonuses* at the rates

specified in subdivision (b) of paragraph 1 hereof shall be *paid while employees are in the war zones defined herein.*" (123-124)

The agreement with the "Marine Firemen" is identical (73, 74, 114-117). By this "provision" of the Supplementary Agreement the obligation of appellee in the Rider to "repatriate to a United States Port on the *Pacific Coast*" has been supplanted by the obligation merely to repatriate "to a *Continental* United States Port." This was admittedly done when the four appellants were landed from the M/V "GRIPSHOLM" at New York on December 2, 1943.

The quoted paragraph from the October Supplementary Agreement likewise substituted for the obligation of appellee in the Rider to pay "*bonus* to the date members of the crew arrive at a United States Port, on the *Pacific* Coast," the obligation merely to pay war bonus in case of loss or internment of the vessel "*while employees are in the war zones defined herein.*"

History of clause in October supplementary agreements providing that in case of loss or internment of vessel war bonus was to be paid "*while employees are in the war zones defined herein.*"

The following will be observed from the foregoing detailed discussion of the negotiations between the operators and the unions:

1. There was no Supplementary Agreement on the subject of *any* compensation after loss or internment of the vessel before August 16, 1941. Without some

special agreement *all* compensation ended in such case.

2. In negotiations with licensed officers leading up to the contract of that date they sought in case of loss or internment of vessel "wages and emergency wages *and* war bonus until and including the day of their arrival in a port of the United States," thus linking *wages* and *bonus*.

3. Operators made a counter-proposal agreeing to this demand for wages and emergency wages but offering to pay bonus in such event *only "while the men are in the danger zones defined herein,"* thus clearly disassociating *wages* and *bonus* and limiting the latter to the *period* when employees were in a "defined" zone.

4. In the actual agreement of August 16, 1941, between the operators and *licensed* officers *bonus ceased* upon the loss or internment of the vessel although wages and emergency increase continued until the officers were repatriated to a continental United States port. This situation continued on the Atlantic Coast in the case of licensed personnel until "Pearl Harbor."

5. On the *Atlantic Coast* supplementary agreements between American Merchant Marine, Inc., and *unlicensed* personnel *likewise ended* war *bonus* upon the loss or internment of the vessel, although wages and emergency increase continued until repatriated to a continental United States port.

6. On the Pacific Coast, however, after the August agreement with licensed officers, the unlicensed personnel in their negotiations with Pacific American Shipowners Association continued to demand wages

and bonus in case of loss or internment of the vessel until seamen were returned to a continental United States port or to the home port, thus again linking wages *and* bonus.

7. In *all* six October Supplementary Agreements on the Pacific Coast the parties finally adopted the *counter-proposal* made by the two Associations to licensed officers on the subject of compensation after loss or destruction of the vessel in the negotiations leading up to the contract of August 16, 1941. These October Supplementary Agreements provided that in the event a vessel was lost or interned "basic" and "emergency wages" would be paid until arrival of the crew member in a continental United States port, *but bonus* was only payable "while employees are in the *war zones* defined herein."

What is a "war zone" as "defined" in the October supplementary agreements?

The October Supplementary Agreement covering "Marine Cooks" provides in part as follows:

> "1. The following war bonus rules shall govern the parties hereto—
>
> "(a) There shall be five *war zones;* namely:
>
> "I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States ports via India and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th Meridian, eastbound, and thereafter no further bonuses will be payable.)

"II. Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage).

"III. Trans-Pacific Voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound, until recrossing the same Meridian eastbound.)

"IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound.)

"V. Canada (Atlantic Coast) (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port.)" (120,121) (See entire Supplementary Agreement in appendix to this brief.)

The other October Supplementary Agreements are substantially the same (114, 119, 259, 265, 266). They all followed the form of the contract of August 16, 1941, and the decision of the National Defense Mediation Board in Case No. 80 to which they are so closely tied.

From the time of the First Supplementary Agreement made by Pacific American Shipowners Association with the Unions on the subject of war compensation, bonus has been universally linked with "voyages," "vessels" and "waters." The contract of August 16, 1941, the decision of the National Defense Mediation Board in Case No. 80 and the October Supplementary Agreements continued linking this definition of a *war zone* with "voyages"; some mention specifically a "vessel" (121, 131, 261, 262). The uncon-

tradicted testimony in the instant case is to the same effect.

> "Q. Now, will you state what was meant by the term 'bonus'? A. Bonus was an agreed sum of money to be paid for the additional dangers of going into dangerous *waters and war* zones." (113)

A "voyage" is thus defined in the dictionary:

> "Formerly, a passage either by sea or land; a journey, in general; *now, only*, a passing or journey by sea or water from one place, port, or country, to another; esp., a passage or journey by *water* to a distant place or country."
>
> Webster's New International Dictionary.

> "Voyage. 1. A journey by *water*, especially by sea; commonly used of a somewhat extended journey by water; formerly, any journey, as, a voyage across the sea. 2. Specif., the outward and homeward passages of a vessel taken together; the whole course of a vessel before reaching her home port."
>
> Funk & Wagnalls New Standard Dictionary.

The slight ambiguity in the meaning of the language in the October Supplementary Agreements on *bonus* may be accounted for by the fact that under the October Supplementary Agreements the "*war zone*" in *question* is "defined" as follows:

> "III. Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound until recrossing the same Meridian eastbound)" (121)

Standing alone, this might be thought to create a "war risk zone" of all *land* and *sea* west of the 180th

Meridian and thus entitle the crew member of a vessel lost or interned west of the 180th Meridian to *bonus* whether he was on *land* or *sea* until he recrossed the 180th Meridian eastbound. This is the view of appellants (Appellants' Brief, p. 42). Taken literally, the theory mentioned above might allow appellants to continue to collect bonus as they have never *recrossed* the 180th Meridian eastbound, the M/V "GRIPSHOLM" having continued around the world and having discharged appellants in New York. This is *not* the meaning of the Supplementary Agreement. Bonus is payable only while employees are in the "war zones *defined* herein." Wages and emergency increase, on the other hand, are linked to a period of *time*, and continue after loss or internment of the vessel to the "date the members of the crew arrive at the ultimate destination" irrespective of the *location* of the individual.

In the First Supplementary Agreements of 1940, in the Second Supplementary Agreements of February 10, 1941, and in the Third Supplementary Agreements of May 19, 1941, bonus was payable in terms of "*voyages*" first from arrival of vessel at first Japanese port westbound until its departure from last Japanese port eastbound, then from crossing of 160th Meridian westbound until recrossing the 160th Meridian eastbound. At that time, it will be recalled, there was *no* provision whatsoever in supplemental agreements for payment of any compensation *after* loss or internment of the vessel and the consequent end of the "voyage." As explained above, prior to the agreement of August 16, 1941, there being no specific contractual obligation to pay any compensation after

loss or internment of the vessel it would *automatically cease* upon such event. *The Supplementary Agreements of 1940, February 10, 1941, and May 19, 1941, that bonus was payable from arrival of vessel at first Japanese port westbound until departure from last Japanese port eastbound, and from crossing of 160th Meridian westbound until recrossing the 160th Meridian eastbound, at that time could only refer to its continuance during a combined marine and war risk, as it necessarily ended when the vessel was lost or interned.*

In so far as wages and emergency increase were concerned the October Supplementary Agreements specifically provided that they should be paid "to the date the members of the crew arrive in a Continental United States port." But as to bonus it was to be paid "while employees are in the war zones *defined* herein," which definition is in virtually the same language as it had been for a year and a half before any provision was made for its continuance after loss or internment of the vessel, and when it could *only mean* that it was payable only while a combined war *and* marine risk existed. In other words, loss or internment of the vessel did not terminate bonus at once, if the seamen were still on a "voyage" exposed to marine risk.

A "war zone" as defined in the Supplementary Agreements has always contemplated from the beginning a combined marine *and* war risk.

The same language has continued to have the same meaning.

Words used in one sense in one part of a contract

are as a general rule deemed to have been used in the same sense in another part of the instrument where there is nothing in the context to indicate otherwise.

In *Pringle v. Wilson*, 156 Calif. 313, 104 P.(2d) 316, 24 L.R.A., N.S., 1090, the court said:

> "It is a familiar rule of construction that, other things being equal, words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another."

In *Jensen v. Franklin* (10 C.C.A. 1934) 74 F.(2d) 501, the court said:

> "Words used in a certain sense in one part of a contract will be deemed to have been used in the same sense in another part, unless the context indicates otherwise."

In *Midland Valley R. Co. v. Railway Express Agency* (10 C.C.A. 1939) 105 F.(2d) 201, the court said:

> "It is an inveterate rule in the construction of a written instrument that ordinarily the same word occurring more than once is to be given the same meaning unless the context indicates that it was used in a different sense."

12 Am. Jur. 761.

The situation is clarified if we take another "war zone" to use as an illustration. "War Zone * * * II" is described as follows:

> "Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)" (121).

This obviously means that a crew member is entitled to bonus on the entire *voyage* from the United States to Russia and return irrespective of crossing any particular meridian. It could certainly not be successful-

ly urged that in the event of loss or internment of a vessel making such a voyage that a crew member who had been interned in Europe, say in Germany, would be entitled to bonus during the period of his *internment ashore.* A crew member might on such a voyage very well have been captured by a German vessel and interned in Germany and later repatriated to the United States. In such case by the October Supplementary Agreements wages and emergency wages would certainly be payable until his repatriation to a "Continental United States port." However, he could certainly not successfully claim that during his internment he was in a "war zone defined herein" when the definition was "Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)." He would probably be entitled under such circumstances to bonus until he reached shore after loss of his vessel and the obligation might be resumed through his repatriation voyage, if he were repatriated by sea. But internment ashore, in, possibly, Southern Germany, would certainly *not constitute* being "*in the war zones defined herein,*" to-wit: "Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage)," so as to entitle him to bonus for the period.

The counter-proposal of the two Associations at the Washington Conference on August 12, 1941, thus adopted on the Pacific Coast in the October Supplementary Agreements, was a compromise by which the bonus would *not stop* at once upon the loss or internment of the vessel but would continue so long as there was a marine *and* war risk encountered before the crew reached land or during a repatriation voy-

age. In August, 1941, it was a counter-proposal to the unions' demand that war bonus should continue *like* wages after the loss or internment of a vessel *until the crew be repatriated to the United States.* The counter-proposal of the Associations first incorporated in the Pacific Coast October Supplementary Agreements finally became the *national* rule under the Maritime War Emergency Board.

When the Maritime War Emergency Board was created after "Pearl Harbor" it gave "*additional consideration * * * to existing collective bargaining agreements*" (280) before adopting a rule on bonus after loss or internment of the vessel, and adopted, *not* the strict rule of the Atlantic Coast that following loss or internment of the vessel *bonus ceased entirely*, but it adopted the more *liberal* policy of the Pacific Coast agreement once *offered* by the two Associations that war bonus, being always a compensation for marine *and* war risk, should continue even after loss or capture of the vessel, while crews were exposed to both risks, which meant until they reached shore after a loss or while they were being repatriated by sea.

If the October Supplementary Agreements are controlling the decision of the lower court must be slightly modified in the following respects:

1. Increased war bonus from December 7, 1941, to December 29, 1941, to each appellant in the sum of $14.69 must be *disallowed.*

2. War bonus during the repatriation voyage of the M/V "GRIPSHOLM" must be reduced 20% from $100.00 to $80.00 per month.

Otherwise, the decision of the lower court must be

affirmed. The difference in the final result is not substantial.

Are decisions of Maritime War Emergency Board incorporated?

The adoption of the October Supplementary Agreement possibly does not, however, give *full effect* to the last paragraph of the Rider as there were subsequent developments following the commencement of the war which *increased* bonus which such a construction would ignore.

The Decisions of the Maritime War Emergency Board were adopted by the trial court as having been incorporated by the terms of the Rider. Such a construction follows the trend of negotiations toward *National Uniformity* in the summer and fall of 1941. In the August meeting of the Industry, Chairman Macauley of the U. S. Maritime Commission, emphasized that contracts should only be made to last until a war started. He promised that in such event another meeting would be called to review the subject in the light of commencement of the war (222). His remarks were made a part of the contract of August 16, 1941, and are an integral part of the background leading to the solution of this case.

In accordance with the promise of Commissioner Macauley a meeting was called jointly by the U. S. Maritime Commission and the Department of Labor in Washington, D. C., ten days after the war started; all interested operators and unions attended, and the voluntary board created by the parties at such time has functioned uninterruptedly in connection with *all*

bonus questions since the war began (92, 93, 200-6). This Board substantially *increased* bonus rates and extended bonus areas by its Decision No. 2 following the pattern of "voyages."[4] (47, 48, 272, 274) As indicated above, it also adopted what it believed to be the most liberal general policy of the industry on bonus payments after loss or internment of the vessel, as reflected by "*existing collective bargaining*" agreements on the Pacific Coast. The Decisions of this Board thus increasing "bonus" would seem to be agreements the "terms and effective date" of which are incorporated by the last clause of the Rider. They would further seem to be "the result of negotiations" within the broad sense of the words as the last paragraph of the Rider provides (31, 36).

The Maritime War Emergency Board in a Decision made June 21, 1944, upheld its authority under the "Statement of Principles" to *reduce*, as well as *raise*, war bonuses. In the course of the opinion, the court said (1944 A.M.C. 1022):

> "It has always been the theory and practice of the Board that the Statement of Principles was *not* a *departure* from collective bargaining practices, but was a plain mandate from the signatories to the Board to set up a procedure to cover war risk compensation and insurance on a *uniform* basis covering the entire nation and the entire industry for the duration of the war. To return now to individual bargaining between individual operators and unions in this field or to

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[4]For general discussion of early activities of Maritime War Emergency Board, see 1942 A.M.C. 308, discussing the first five Decisions of the Board.

> take the position that the Board can act on individual cases and take action on a *national uniform basis* only by way of recommendation, is to deny the controlling intent of the Statement of Principles and to reproduce the chaos and confusion which brought the signatories together in December of 1941."

So again, the making of payments in the event the vessel was lost or interned might well be said, in view of the last paragraph of the Rider, to have been "expressly left open subject to later agreements either in ship's articles or such collective bargaining agreements" within the meaning of the language of Decision No. 5, Revised, making it retroactive in that event to December 7, 1941 (281-282). The last paragraph of the Rider expressly made the "terms" of subsequent negotiations, which *raised bonus*, governing.

The language of the Statement of Principles (Respondent's Exhibit K) (199) reading as follows should not be misinterpreted:

> "It is understood and agreed that all rights guaranteed to labor and industry with respect to collective bargaining will be retained and all agreements and obligations arising as a result of collective bargaining agreements will in no way be violated." (See appellant's brief, page 53)

This language has to do with the general subject of collective bargaining on wages and working conditions. It is undisputed that the Maritime War Emergency Board since its creation has "exclusively handled" all bonus questions (92, 93). The Decisions of the Maritime War Emergency Board on bonus from

the beginning cut directly across existing agreements by making the Decisions retroactive.

Appellants at first appeared to think the Decisions of the Board applied. In their original libel, filed in the instant case, they claimed war bonus at the rate of $100.00 per month under Decision No. 2 of the Maritime War Emergency Board. (4) When exceptions were sustained by the lower court to this reference to the Decisions of the Maritime War Emergency Board, appellants amended their libel and sought recovery of war bonus at the rate provided in the October, 1941, agreements (9, 15, 16). Appellants assert no error in the action of the trial court on these exceptions and do not urge the "Decisions" as incorporated by the Rider (Appellants' Brief, p. 39).

Maritime War Emergency Board Decision No. 2, made expressly retroactive to December 7, 1941, following the pattern of the industry, covered the subject of bonus in terms of "voyages." The Maritime War Emergency Board itself was set up while the "voyage" of the "CAPILLO" was still in progress, the vessel with its entire crew being at Manila, P. I., not having been destroyed until December 29, 1941, ten days after the appointment of the Board. It can be argued that Decision No. 2 of the Board dated January 10, 1942 (270) increasing war bonus had no application to this case as the "voyage" of the vessel had ended and the decision contemplated voyages then in progress. On the other hand, it may be likewise argued that Decision No. 2 and Decision No. 5, Revised, of the Board (270, 280) contemplated voyages which were in existence on December 7, 1941, which

would clearly embrace the case of the "CAPILLO." An "area" bonus of $5 per day in addition to "voyage" bonus was first created by Decision 2A of the Board adopted Feb. 27, 1943. But even this "area" bonus was and is not payable unless a crew member is exposed to both a war and marine risk. See 1944 A.M.C. 1020, 1023. 1945 A.M.C. 1176, 1182.

As heretofore indicated the difference in the ultimate result is relatively immaterial as the appellants receive slightly less under the October Supplementary Agreements. We have tried to place all the pertinent facts before the court.

COMMENTS ON BRIEF OF APPELLANTS

No dispute in facts.

All parties are agreed that there are no disputed questions of fact, as appellants say on pages 2 and 29 of their brief.

Provisions of October supplementary agreements covering "marine cooks," "marine firemen" and "sailors" are identical save for the general introductory paragraphs.

On page 6 of appellants' brief, and repeated on pages 6, 7, 31, and 42, are statements that Exhibit A-3, the October Supplementary Agreement covering "marine firemen," differed from Exhibit A-4 covering "marine cooks" in that the former did not contain the following paragraphs included in the latter:

> "In the event a vessel is interned, destroyed, or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective

bargaining agreement between the parties shall be paid to the date members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

* * * * * * *

"The provisions of this agreement shall be effective on all voyages shipping articles for which were entered on or after August 16, 1941, or upon *any voyage* to which the provisions herein are made applicable by special agreement or rider attached to shipping articles." (119, 114, 266)

All three October Supplementary Agreements covering unlicensed personnel contained these clauses.

Proctor for appellants upon having the matter called to his attention promptly notified the Clerk of this Court of this inadvertent error.

As stated in the earlier portion of this brief similar language is contained in the October Supplementary Agreements covering staff officers and licensed officers (259, 265, 266).

Exhibit A-12 emphasizes consideration given by Maritime War Emergency Board to *existing* collective bargaining agreements.

The remark on page 13 of appellants' brief that American Mail Line Ltd. "as one of the signatories to the Statement of Principles, did not follow this admonition of the Maritime War Emergency Board" to "destroy" the Decisions which were later com-

bined to make Decision No. 5, Revised (280), is not quite understood. It appears to be a criticism but the reason for same is not clear. The Decisions contained in Respondent's Exhibit A-12 (287) are certified to by the Secretary of the Maritime War Emergency Board as being "true, full and correct copies of the originals of the same held in my custody." They were introduced as showing the various steps which led to the ultimate adoption of the rules of the Board on compensation after the loss or internment of the vessel. The first Decision No. 5 of January 23, 1942, stated that in making this Decision the Board had "given careful *consideration* to * * * existing collective bargaining agreements" (288).

When Decision No. 5, Revised, dated February 21, 1942, was promulgated combining the original Decision and amendments, it contained the new rule first adopted on February 17, 1942, on payment of war *bonus after* loss or internment of the vessel (294). Decision No. 5, Revised, dated February 21, 1942, stated "The Board has given *additional* consideration to * * * existing collective bargaining agreements prior to writing these revisions" (280).

Exhibit A-12 was introduced merely to emphasize the continuing efforts of the Board to carry forward what it believed to be the general rules on the subject matter created by "existing" collective bargaining agreements. The October Supplementary Agreements were the most favorable "existing" contracts for the seamen on this subject and the Board adopted their rue on payment of bonus after loss or internment of the vessel while seamen were in the "war zones de-

fined herein," *i.e.*, while they were on a "voyage" in dangerous waters.

Date of decision in Case No. 80 of National Defense Mediation Board.

On page 18 of appellants' brief it is stated that the date when this decision was handed down "does not appear in the record." President J. B. Bryan of the Pacific American Shipowners Association testified concerning this subject: "This decision which is undated was rendered and distributed about October 6, 1941" (195).

The decision of the National Defense Mediation Board in Case No. 80 is significant in two respects: (1) It was the basis on which collective bargaining agreements were signed with unlicensed personnel on the Atlantic Coast (173) and on the Pacific Coast (195); (2) Following this decision minor adjustments had to be made on both Coasts to maintain the differential between licensed and unlicensed personnel (177, 196).

The decision is specifically mentioned in the introductory paragraphs of all October Supplementary Agreements covering unlicensed personnel (114, 119, 266). While the Board only made "Recommendations" these recommendations adopted the practice of the industry to describe bonus areas in terms of "voyages." Case No. 80 is of importance as a part of the whole history leading up to the subject matter of this litigation, particularly as these recommendations were accepted on both Coasts.

The agreement of August 16, 1941, was changed by Exhibits A-5 and A-6.

On page 20 of appellants' brief the statement is made that Exhibit B, the agreement of August 16, 1941, with licensed officers, was superseded by Exhibits A-5 and A-6 "although Mullins testified there was no other agreement (Aps. 178), only some recommendations by the commission." Mr. Mullins testified (177) that on the Atlantic Coast the rates for licensed officers provided by the contract of August 16, 1941, were raised because of the inequity created by the increase in the bonus to unlicensed personnel by Decision No. 80 of the National Defense Mediation Board. He testified that except for this increase the contract of August 16, 1941, remained unchanged until the War Emergency Board. He was, of course, speaking of the contract in so far as *his* Association was concerned (178). Mr. Bryan testified, concerning Pacific American Shipowners Association, that a corresponding increase in the rates of the contract of August 16, 1941, were made for the Pacific Coast and were incorporated in the October Supplementary Agreements, Exhibits A-5 and A-6 (259, 265) which on the Pacific Coast, of course, supplanted the agreement of August 16, 1941.

Rider will be interpreted to carry out the *general intent* to make supplementary agreements controlling.

The quotation on page 33 of appellants' brief to this effect is certainly good law.

The general purpose of uniformity is evident throughout the history of negotiations between the

parties in the latter half of the year 1941. The language of the first and last paragraphs of the Rider carry forward this trend. A construction which will support this "general" purpose is always favored.

Williston on Contracts, Revised Edition, §619:

"The court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable; and if that is impossible an interpretation which gives effect to the *main apparent* purpose of the contract will be favored. Indeed in giving effect to the general meaning of a writing particular words are sometimes wholly disregarded, or supplied, or transported."

"§624. It was early laid down, that, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected. The same doctrine has been held in some modern cases applicable to contracts generally. * * * The *true rule* seems to be as stated in a Maine decision. * * *

" 'When one intention appears in one clause in an instrument, and a different, conflicting intention appears in another clause in the same instrument, that intention should be given effect which appears in the *principal* or more *important* clause'."

Union Water Co. v. Lewiston, 101 Me. 564, 65 A. 67.

12 Am. Jur. 779:

"Where a repugnancy is found between clauses, the one which essentially requires something to

be done to effect the *general* purpose of the contract is entitled to greater consideration than the other. The whole agreement should, if possible, be construed so as to conform to an evident consistent purpose. Accordingly, a subsequent clause irreconcilable with a former clause and repugnant to the *general* purpose and intent may be disregarded."

Marx v. American Malting Co. (6 C.C.A.) 169 Fed. 582, 584:

"* * * Then, again, it is a fundamental rule in the interpretation of agreements that we should ascertain the prime *object* and purpose of the parties, and, in case of ambiguity produced by its minor provisions, the latter should, if possible, be so construed as not to conflict with the *main* purpose. * * *"

Linde Dredging Co. v. Southwest Co. (5 C.C. A.) 67 F.(2d) 969, at p. 972.

An excellent example of the application of this rule is found in the following case:

Minnesota Tribune v. Associated Press (8 C.C.A.) 83 Fed. 350:

A contract between an association engaged in furnishing news, and a certain newspaper company, provided, in its seventh paragraph, "that the rights, duties, and obligations of the parties hereto, except as hereinbefore specifically provided for, shall be *controlled and governed by the by-laws* of the said party of the first part," etc. The court held, that the effect of this was to make the *subsequent provisions* of the contract subordinate to the by-laws, so that the ninth paragraph, which provided that the news association

should not extend its news service to any publications not then entitled to receive the same, without the written consent of the other contracting party, was controlled and modified by a provision of the by-laws which provided that newspapers entitled to receive news service from certain old associations on a given date should be entitled to have service extended to them *without* the consent of the local members. The court said (p. 354):

> "* * * For the purpose of reaching a correct conclusion concerning the obligations imposed by the contract in question, it is clear, we think, that the contract should not be considered by itself, but should be construed in connection with the by-laws of the Associated Press. Reference is made to the by-laws in the contract, and the seventh paragraph thereof expressly declares 'that the rights, duties, and obligations of the parties hereto, except as hereinbefore specifically provided for, shall be controlled and governed by the by-laws of said party of the first part, now or hereafter in force during the life of this contract.' The necessary effect of this provision of the contract was to make the *subsequent provisions* thereof, including the ninth, subordinate to the by-laws. * * *"

The "general" intent of the Rider to the Shipping Articles of the "CAPILLO" was clearly to serve as an interim document until applicable supplementary agreements covering the subject matter should be negotiated which would thereafter govern (98, 154). Such October Supplementary Agreements were negotiated, by the terms of which the situation here presented was fully covered. Unless the last paragraph

of the Rider contemplates the incorporation of the Decisions of the Maritime War Emergency Board, the provisions of the October Supplementary Agreements clearly cover the instant case in all respects. Appellants' brief, on page 33, referring to provision covering compensation after loss or internment of the vessel virtually admits this is the fact by saying:

> "* * * it may be possible to raise some argument on the Marine Cooks & Stewards agreement * * * in that there was provision both in the rider and the supplementary agreement relating to the length of time that war bonus is paid."

It being now agreed that *all* October Supplementary Agreements had such a provision, this concession must be widened to cover all four appellants. Not only is it "possible to raise some argument" to that effect, but we submit that it is clear that the October Supplementary Agreements in the case of all four appellants clearly *supplant* the Rider in case of conflict.

War bonus—wages or not.

The cases discussed on pages 35 and 36 of appellants' brief are wholly without point in this discussion. There is no suggestion made in this brief that bonus when earned under the terms of the Rider to the Shipping Articles is not supported by adequate consideration.

The rider is valid where it incorporates a *negotiated* agreement even if subsequently made.

On page 37 of appellants' brief there is a suggestion that the Rider is invalid under 46 U.S.C. 564. This is, of course, not seriously urged as without the

Rider there could be no claim at all for bonus. There are two cases cited in support of the proposition that changes in wage schedules shown in shipping articles are illegal.

Jones v. United States (D.C. Md.) 284 Fed. 721;

The Howick Hall (D.C. La.) 10 F.(2d) 162.

Each contained a clause in the Shipping Articles purporting to make wages subject to later change in rates of pay.

In both cases the reduction in the scale of wages shown on the shipping articles was by the subsequent *unilateral* action of the employer. Here, the first and last paragraphs of the Rider explicitly refer to and incorporate outside agreements — possibly made in the future through *joint* action of the representatives of the parties. In the last case, above, the court said:

> "* * * I have no doubt that, had the officers of the seamen's unions and the shipowners' association *reached an agreement*, both sides would have been bound by it, and the clause could have been given effect; but to allow the shipowner or the captain to arbitrarily reduce wages would be going too far, and to give the clause that meaning would render it void for lack of mutuality."

Under October supplementary agreements bonus only payable while employees are in the "war zones defined herein."

Appellants' brief, page 42, discusses the provision in the October Supplementary Agreements that in case of loss or internment of the vessel,

> "* * * war bonus at the rate specified in sub-

division (b) of paragraph 1 hereof shall be paid while employees are *in the war zones defined herein.*"

The brief says,

"This paragraph provided for the payment of a bonus to the men while in the war zone. * * *"

The brief *omits* the words "defined herein." The words "war zones" are specifically defined in the October Supplementary Agreements in the terms of "voyages" (119, 114). The brief continues:

"* * * Nothing is said about any *voyage;* nothing said about any services on the vessel. * * *"

This, again, is not accurate as war bonus was specifically *only* to be paid "while employees are in the war zones *defined herein.*" The *definition* is wholly in the terms of "voyages." As indicated in the foregoing, this refers to a period while employees are exposed to the risks of a "voyage." It has no reference to the location of any employee while on *land.*

Decision No. 5, Revised, of Maritime War Emergency Board covers the subject matter when same is left open for *future* agreement.

The quotations on pages 44 and 55 of appellants' brief concerning the retroactivity of Decision No. 5 are not accurate or complete. As reproduced in appellants' brief it has *omitted* the language italicized below:

"This Decision is retroactive to December 7, 1941, in all cases where there was no agreement with respect to the making of payments provided for herein contained in ship's Articles en-

tered into on or before January 23, 1942, in the case of payments provided for in Articles 1 to 3, inclusive, hereof, February 6, 1942, in the case of payments provided for in Article 4 hereof, and February 21, 1942, with respect to payments provided for in Article 6 hereof, *or collective bargaining agreements in effect at the time when ship's articles were entered into as aforesaid, or where the making of such payments were expressly left open subject to later agreement either in the ship's articles or such collective bargaining agreements.*" (281-2)

It is on the italicized language making it applicable where the subject was "expressly left open subject to later agreement either in the ship's articles or such collective bargaining agreements," that the trial court found it applicable here under the last paragraph of the Rider.

Rider to be construed against those who proposed and presented it.

The following cases cited on page 46 of the brief are hardly helpful in this discussion:

United States v. Westwood (C.C.A., Va.) 266 Fed. 696;

The Catalonia (D.C., Va.) 236 Fed. 554;

Jansen v. Theodore Heinrich, Fed. Cases 7215;

Wope v. Hemmingway, Fed. Cases, 18042;

The Disco, Fed. Cases, 3922.

They have to do with agreements in which the parties were not dealing on *equal* terms at arms' length. Such is not the situation here. The Rider here was not

prepared by the owner and presented to the crew. No ignorant seamen and overreaching master or owner are involved. It was a rider carefully prepared by very well informed unions and presented by them to American Mail Line Ltd. Under familiar rules of construction the Rider should be most strongly construed against the party who drew and presented the document.

In *Flotation Systems v. United States* (9 C.C.A.) 136 F.(2d) 483, the court said:

> "It is the rule in California that the words of a contract will be taken most strongly against the party who employs them."

The court adopted the same rule.

The rule thus enunciated is also the rule in Oregon and in Washington.

Hyland v. Oregon Co., 74 Ore. 1, 144 Pac. 1160;

Foss v. Golden Rule Bakery, 184 Wash. 265, 51 P.(2d) 405;

Dorsey v. Strand, 21 Wn.(2d) 217, 150 P. (2d) 702;

Southern Railway Co. v. Coco Cola (4 C.C. A.) 145 F.(2d) 304;

12 Am. Jur. 795.

In Restatement of the Law of Contracts, Sec. 236(d), the authors said:

> "Where the words or other manifestation of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed unless their use by him is prescribed by law."

Northern Pacific v. Twohy Bros. (9 C.C.A.) 95 F.(2d) 220, cert. den. 304 U.S. 575;

12 Am. Jur. 795.

Previous negotiations of the parties are admissible in interpreting the rider.

On page 46 of appellants' brief the following language is used:

> "The admissibility of any evidence other than these agreements violates the parol evidence rule that all prior negotiations both oral and written, merge in the written agreement. * * *"

This is a repetition of similar language on page 29 of the brief. The authorities on the subject are to the contrary of the above language and such negotiations are clearly admissible.

Restatement of the Law of Contracts, §228:

> "An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted."
>
> §242: "*Previous negotiations* between parties to an integrated agreement, whether the negotiations relate to that agreement or to another, *are admissible* to show that the agreement has any meaning which is not impossible under the standard stated in §230 though that meaning would not otherwise have been given to the agreement."

§230 reads as follows:

> "The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably

intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration other than oral statement by the parties of what they intended it to mean."

12 Am. Jur. 757:

"In the interpretation of a writing which is intended to state the entire agreement, *preliminary negotiations* between the parties *may*, however, *be considered* in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument. The purpose of considering their preliminary negotiations is to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract. If the previous negotiations make it manifest in what sense they understood and used those terms, they furnish the best definition to be applied in the interpretation of the contract itself."

Authority of union to modify the contract.

On pages 47, 52 and 54 of appellants' brief the authority of the unions to modify an agreement is questioned.

The references on pages 47 and 48 to the following authorities:

31 Am. Jur. 874;

Ahlquist et al. v. Alaska-Portland Packers' Ass'n. (C.C.A. 9) 39 F.(2d) 348, 350;

The Henry S. Grove (D.C., Md.) 22 F.(2d) 444.

limiting the right of unions to modify individual agreements are not helpful in the instant discussion

for the reason that the Rider to the Shipping Articles on which appellants base their claim specifically provides in its opening and closing paragraphs that the "provisions" and "terms and effective date" of Supplementary Agreements to be *negotiated* between unions and Pacific American Shipowners Association are to govern the relationships of the parties. This is in line with the strong language of the Supreme Court of the United States in *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, at 338-9, where the court emphatically pointed out the present trend toward discouragement of individual agreements in favor of general collective bargaining agreements. The court said:

> "But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. * * * The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. * * * We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous. * * *

"* * * We know of nothing to prevent the employee's, because he is an employee, making any contract *provided* it is not *inconsistent* with a collective agreement or does not amount to or result from or is not part of an unfair labor practice. * * *."

The Rider on bonus is certainly inconsistent with both the October Supplementary Agreements and the Decisions of the Maritime War Emergency Board.

Appellants argument on page 33 of their brief that the issues in this case are *not* between the Unions and the Association but between the crew and the operator is wholly without merit. The appellants, admittedly, are all members of the unions which made the October Supplementary Agreements (See Appellants' Brief, pp. 25, 29). The Rider incorporates the "provisions" and the "terms and effective date" of such supplementary agreements. Without incorporating the October Supplementary Agreements no contract at all exists and bonus would end when the vessel was lost.

At this point it may be well to emphasize the controlling character and uniform application of the *contracts* and *supplementary contracts* of the six maritime unions and Pacific American Shipowners Association. Testimony of W. L. Williams (110):

"Q. And when a ship would pay off, will you explain what governed the rights of the parties in case of dispute? A. The existing contract.

* * * * * * *

"Q. And those contracts in every case, would they govern as to who was right or wrong? A. They would." (111)

(134) "Q. (By Mr. Ambler): Mr. Williams,

referring to these contracts and the supplemental agreements which you have described and identified, were the crews of the various vessels of the American Mail Line which sailed out of the Columbia River governed by those contracts and supplemental agreements? A. They were. Q. And did you pay the crews in accordance with those? A. We did."

(153) "Q. The American Mail Line in the fall of 1941 had all of its vessels covered by agreements with the six Maritime Unions which are here mentioned? A. That is correct. Q. And it had no contracts with any other Unions during that period? A. It did not. Q. And all of its employees, seagoing employees, were covered by agreements with these six unions, is that correct. A. That is correct."

(155) "Q. (By MR. AMBLER): And all of your crews of all of your ships, during 1941 and before, did all of their collective bargaining through the Unions with the Association which represented your company? A. That is true. Q. And they were paid in accordance with these various agreements which were made between the unions, acting on behalf of the employees, and the Association, acting on behalf of the Employer, is that correct? * * * A. That is correct."

(156) "Q. (By MR. AMBLER): Will you state whether or not all crews of all vessels of the American Mail Line, during the period of 1940 and '41, were governed by agreements and supplemental agreements entered into by the Pacific American Shipowners Association on behalf of the Employer, and the six Maritime Unions representing the seagoing personnel? A. They were."

Invitation to the conference of August 12, 1941, and the introductory remarks of Commissioner Macauley are part of contract of August 16, 1941.

On page 49 of appellants' brief appellee is criticized for attaching to Exhibit B (the contract of August 16, 1941) the invitation of Admiral Land to the meeting and the opening remarks of Commissioner Macauley. Without these exhibits the contract is incomplete as it provided in part,

> "At a conference terminating on this 16th day of August, 1941 * * *, to deal with the subject as announced by the Maritime Commission in the *attached* letters of invitation and statement made by Commissioner Macauley at the opening of the meeting on August 12, 1941, agreement was reached as follows:" (213)

Circular of American Merchant Marine Institute, Inc.

On page 51 of appellants' brief, the introduction of a Circular of August 18, 1941, of the American Merchant Marine Institute, Inc., to its members is criticized. It is interesting as a contemporaneous construction of the agreement of August 16, 1941, to which all of the October Supplementary Agreements relate made long before a dispute had arisen. The pertinent portion of the Circular is as follows:

> "* * * The new agreement provides for continuance of basic wages and temporary emergency wages in case of internment, until arrival back in the United States, *but payment of bonus does not continue under such circumstances.*" (224)

Later general agreements are expressly incorporated by the rider.

It is quite true, as stated on page 57 of appellants' brief, that a general agreement between an association and unions does not become binding until adopted by the parties concerned. The quotation from *Clark v. Claremont Apt. Hotel Co.*, 19 Wn.(2d) 115, 122, 123, 141 P.(2d) 403, appears to state the general rule. The opening and closing paragraphs of the Rider, however, in this instance show a specific adoption of later negotiations by the parties concerned. The fact that these later negotiations may in certain respects result unfavorably to the parties concerned is immaterial. This is well illustrated in the *Clark* case. There a general agreement between apartment house owners and the union provided for a wage of $125.00 a month. About a month following the execution of the general written agreement an oral agreement was made between an apartment house operator and the union covering Mr. Clark, by the terms of which his previous compensation was raised about $22.00 a month, but fell short of the $125.00 a month general wage, the reason for the differential resting on a variety of causes including the age of the plaintiff. In ruling against the plaintiff who sued for the difference between the amount he received and the amount provided under the general contract, the court said:

> "* * * The appellant has not been injured by the oral contract; he has, in fact, been benefited thereby to the extent of twenty-two dollars a month. *If he takes the benefit of that contract, he must likewise be governed by its limitations.*"

Appellants have taken the benefits of the increased rates and coverage of the October Supplementary Agreements.

This same rule is recognized by the language of the first and last paragraphs of the Rider which clearly contemplate that the parties shall be governed by the "*provisions*" and the "*terms* and effective date" of general agreements. The suggestion contained on pages 7, 31 and 32 of appellants' brief that only the increased "rate" of the Supplementary Agreements *without* all the accompanying "provisions" and "terms" should be applied is wholly untenable.

CONCLUSION

In conclusion, we submit that the decision of the trial court in finding that the Rider to the Shipping Articles of the "CAPILLO" incorporated the Decisions of the Maritime War Emergency Board is correct and the judgment below should be in all respects affirmed.

In the *alternative*, and only if the above is not the view of this court, we submit that the decision of the trial court should then be modified by finding that the Rider to the Shipping Articles incorporated the "provisions" and the "terms and effective date" of the October Supplementary Agreements, such modification resulting in the following changes in the judgment of the court below:

1. Disallowance to each appellant of the sum of $14.67, granted by the court below.

2. Reduction of repatriation bonus to each appel-

lantlant by 20%, to-wit, from $273.33 to $218.66.

In all other respects the trial court should be affirmed.

Respectfully submitted,

JOHN AMBLER,
GROSSCUP, AMBLER & STEPHAN,
Proctors for Appellee.

October 29, 1945.

APPENDIX

October Supplementary Agreement Covering "Marine Cooks"—Appellee's Exhibit A-4 (119).

THIS AGREEMENT, dated October 10th, 1941, by and between the Marine Cooks and Stewards' Association of the Pacific Coast hereinafter referred to as the "Union" and the Pacific American Shipowners Association, a corporation, acting on behalf of the companies whose names are subscribed hereto.

WITNESSETH:

WHEREAS, a collective bargaining contract between the parties dated July 5, 1940, and which has been automatically renewed until September 30, 1942, specifically provides among other things for the establishment of bonuses and other special benefits on vessels going into war zones; and

WHEREAS, in a proceeding before the National Defense Mediation Board between certain other parties the National Defense Mediation Board published recommendations for bonuses for war risk to apply for a period hereinafter specified in this agreement; the parties hereto desire to adopt and follow said recommendations;

NOW, THEREFORE, It is agreed that said recommendations of the National Defense Mediation Board are adopted by the parties hereto and in pursuance thereto do agree as follows:

1. The following war bonus rules shall govern the parties hereto —

(a) There shall be five war zones; namely:

I. Trans-Atlantic voyages to Spain, Portugal, East, South or West Coasts of Africa, Red Sea, Persian Gulf, India, Iceland and Greenland. (Whole voyage; except that if any vessel continues eastbound to United States

ports via Indian and the Pacific Ocean said bonus rates for such area will continue until the vessel passes the 180th Meridian, eastbound, and thereafter no further bonuses will be payable.)

II. Trans-Atlantic voyages to Russia (Archangel, etc.) (Whole voyage).

III Trans-Pacific voyages to Japan, Philippine Islands, China, Indo-China, East Indies, Malayan Peninsula. (After crossing the 180th Meridian westbound, until recrossing the same Meridian eastbound).

IV. Trans-Pacific voyages to New Zealand or Australia. (From arrival of vessel in Suva or the crossing of the 180th Meridian, westbound, until departure from Suva or crossing the 180th Meridian eastbound).

V. Canada (Atlantic Coast). (While vessel is north of 35 degrees of north latitude when bound to or from a Canadian port).

(b) Members of the Union shall be paid a war risk bonus at the rate of $80 per month in the first four areas and $33 in the fifth area provided, however, that all members of the Union entitled to receive basic monthly wages in excess of $120, shall, in lieu of the bonuses specified above be paid at the rate of 66 2/3% of the basic monthly wages in effect on the date hereof in the first four areas and 25% of the basic monthly wages in effect on the date hereof in the fifth area; a schedule of such bonuses is attached hereto and made a part of this agreement.

(c) There shall be paid to members of the Union in addition to the area bonus just provided, the following port bonuses:

(1) for the port of Suez, or any other port which is subject to regular bombing, $100, plus $5 per day for each day beyond five days that the vessel is in that port.

(2) for any port in the Red Sea or in the Persian Gulf not covered by paragraph (1) *supra*. $45.

The same bonuses shall be paid other unlicensed personnel.

The foregoing bonus rules shall be and remain effective until November 1, 1942, unless adjusted prior thereto pursuant to the provisions of this agreement.

2. The following machinery for making equitable future adjustments shall govern the parties hereto—

(a) Either party may ask for a change, an addition to, or subtraction from the present war bonus rules set forth above if the present situation is changed by an Act of Congress, executive action, the spread or contraction of the area of hostilities in the Eastern or Western hemisphere, the entry into the war or withdrawal from the war of belligerents, or the rise or fall of sinkings of American vessels. Such proposed change shall be limited to the areas where conditions are alleged to have changed.

(b) The party asking for the change shall present a request in writing to the party from whom the change is sought. Meetings shall be held at once. If agreement between them is not reached within one week after the date of such request either party may present the matter to the United States Department of Labor, Division of Conciliation, for conciliation. If conciliation is not successful within one week after the matter has been presented to the Division of Con-

ciliation, the Director of the Division may then refer the matter to a Board composed of three disinterested parties to be appointed by the President of the United States. Such Board shall have power to make recommendations.

(c) In the event the parties are unable to agree concerning war bonus rules which shall apply on and after November 1, 1942, the procedure set forth in subdivision (b) of this Section 2 shall be followed in determining the same.

3. This agreement shall remain in effect until November 1, 1943.

4. War Risk Insurance in the sum of $5,000 shall be furnished to members of the crews of vessels on voyages provided for in this agreement.

In the event a vessel is interned, destroyed or abandoned as a result of war operations and is unable to continue her voyage, the basic wages and emergency wages specified in the collective bargaining agreement between the parties shall be paid to the date the members of the crew arrive in a Continental United States port and the employees shall be repatriated to a Continental United States port. War bonuses at the rates specified in subdivision (b) of paragraph 1 hereof shall be paid while employees are in the war zones defined herein.

In the event of loss of personal effects by any member of the crew, due to necessity of abandoning ship resulting from torpedoing, mining or bombing of the vessel, the company agrees to reimburse each unlicensed man so affected by an amount not in excess of $150.00.

5. During the period of these recommendations there shall be in connection with and on account of war bonus issues, no lockout, strike, slow-down, or like

action by either owners or men represented by the parties hereto.

6. The provisions of this agreement shall be effective on all voyages shipping articles for which were entered on or after August 16, 1941, or upon any voyage to which the provisions herein are made applicable by special agreement or rider attached to shipping articles.

7. If any dispute shall arise concerning interpretation of said recommendations of the National Defense Mediation Board or any provision of this agreement and if the parties cannot adjust any dispute by agreement then either party may refer it to the Division of Conciliation for conciliation and if conciliation fails either party may refer the matter to the three-man Board referred to in paragraph 2 (b) hereof for interpretation.

PACIFIC AMERICAN SHIPOWNERS ASSOCIATION
(Sgd.) J. B. BRYAN, *President*

MARINE COOKS AND STEWARDS' ASSOCIATION
OF THE PACIFIC COAST
E. F. BURKE

DATED: October 10, 1941

Acting on behalf of the steamship lines named below:

Admiral Oriental Line
American-Hawaiian Steamship Company
American Mail Line
American President Lines, Ltd.
Alaska Steamship Company
Alaska Transportation Company
Coastwise Pacific Far East Line
W. R. Grace & Co (as Agents for Grace Line, Inc.
Pacific Coast West Coast Mexican Central
American Panama Service of Grace Line, Inc.)
and (Pacific Coast South American Service of
Grace Line, Inc.)
Luckenbach Gulf Steamship Company, Inc.
Matson Navigation Company
The Oceanic Steamship Company
McCormick Steamship Company
(East Coast-South American Service)
(Pacific Coast-Porto-Rico-West Indies Service)
(Intercoastal Service)
Northland Transportation Company
Pacific Lighterage Corporation
Pacific Republics Line
(Moore-McCormack Lines, Inc.)
Santa Ana Steamship Company
States Steamship Company
Pacific-Atlantic Steamship Company (Quaker Line)
Sudden & Christenson
(Arrow Line-Intercoastal Service)
Shepard Steamship Company
The Union Sulphur Company, Inc.
Weyerhaeuser Steamship Company